

D-1-GN-23-004387

8/14/2023 4:50 PM  
Velva L. Price  
District Clerk  
Travis County  
D-1-GN-23-004387  
Ruben Tamez

CAUSE NO. \_\_\_\_\_

**ESTHER'S FOLLIES, INC.**

**Plaintiff,**

**v.**

**UNITED STATES LIABILITY  
INSURANCE COMPANY AND  
MOUNT VERNON FIRE INSURANCE  
COMPANY**

**Defendants.**

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**IN THE DISTRICT COURT**

**200TH, DISTRICT COURT**

**\_\_\_\_\_ JUDICIAL DISTRICT**

**TRAVIS COUNTY, TEXAS**

**PLAINTIFF'S ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Esther's Follies, Inc. files this Plaintiff's Original Petition against Defendants, United States Liability Insurance Company and Mount Vernon Fire Insurance Company, and would show unto the Court and Jury as follows:

**I. PARTIES AND DISCOVERY LEVEL**

1. Discovery is intended to be conducted under Level Three of Tex. R. Civ. P. 190.

2. Plaintiff Esther's Follies, Inc. is a Texas limited liability company.

3. Defendant United States Liability Insurance Company ("USLIC") is an insurance company authorized to conduct business in the State of Texas and may be served through its registered agent for service of process, Daniel Buechler, Thompson, Coe, Cousins & Irons, LLP, 700 N. Pearl Street, Suite 2500, Dallas, Texas 75201-2832.

4. Defendant Mount Vernon Fire Insurance Company ("Mount Vernon") is a foreign insurance company licensed and authorized to engage in the business of insurance in the State of Texas and may be served through the Texas Commissioner of Insurance by providing two copies of the documents to be served and a \$50.00 fee payable by check or money order made out to the

Texas Department of Insurance addressed to Chief Clerk Office, Mail Code GC-CCO, P.O. Box 12030, Austin, Texas 78711-2030 for forwarding to Mount Vernon Fire Insurance Company, 1190 Devon Park Drive, Wayne, Pennsylvania 19087.

## **II. JURISDICTION AND VENUE**

5. The Court has jurisdiction over this matter because the amount in controversy is within the jurisdictional limits of the Court. Venue is proper in Travis County because all or a substantial part of the events giving rise to the claim took place in Travis County, Texas.

## **III. RULE 47 DAMAGE ALLEGATIONS**

6. Pursuant to Tex. R. Civ. P. 47, Plaintiff alleges that the damages sought are within the jurisdictional limits of the Court. Plaintiff seeks monetary relief over \$250,000 but not more than \$1,000,000.

7. Pursuant to Tex. R. Civ. P. 48, Plaintiff elects to plead in the alternative.

## **IV. BACKGROUND FACTS**

8. Plaintiff's property located at 525 E. 6<sup>th</sup> Street, Austin, Texas (the "Property") sustained damage resulting from a hailstorm occurring on or about March 24, 2021 (the "Loss"). At the time of the Loss, the Property was insured by a policy of insurance sold by Defendants USLIC and Mount Vernon to Plaintiff (the "Policy"). All premium payments required to be paid for the Policy had been paid as of the time of the Loss and said policy was in full and effect without lapse during the applicable policy period. The Policy provided coverage for damage to the Property caused by wind and/or hail.

9. After discovering storm damage to the Property, Plaintiff reported a claim to Defendants in accordance with the terms of the Policy (the "Claim"). Plaintiff cooperated with Defendants during the investigation of the Claim by making the Property available for inspections

by Defendants' consultants and adjusters and by providing all available documentation responsive to requests by Defendants.

10. Plaintiff hired Grasso Public Adjusters ("Grasso") to assist with the presentation of the Claim. Grasso presented Defendants with evidence of substantial damage to the Property, including photographs and a repair estimate totaling \$273,269.54.

11. Defendants retained engineering firm Donan Engineering Co., Inc. ("Donan") to inspect the Property and report on the damage. Donan's report noted damage to the roof of the Property, including damage caused by hail. Donan, however, concluded the damage resulted from age-related deterioration. Despite Plaintiff's ongoing cooperation with its insurer, and Grasso's attempts to resolve the disputed claim, Defendants and their representatives denied payment of the Claim based on Donan's assessment.

12. Plaintiff hired engineer W. Tom Witherspoon, Ph.D., P.E. to inspect the Property and provide an opinion on the scope of damage including necessary repairs caused by the Loss. Dr. Witherspoon inspected the Property on October 29, 2021, with Joe Grasso, a representative of Grasso Public Adjusters. His investigation included inspecting and photographing the Property and consideration of the relevant weather and hail history for the Property. Dr. Witherspoon noted that the observed hail spatter and indentations on the Property's roof were consistent with 1" or larger sized hail stones occurring at the Property on or about March 25, 2021, which date was within the Policy period.

13. A copy of Dr. Witherspoon's report was provided to Defendants along with a duplicate copy of Grasso's estimate with a request for Defendants to reconsider its claim decision and fully pay the Claim. However, despite receiving evidence of a covered Claim, including supporting documents, Defendants have maintained their improper Claim decision.

14. Plaintiff cooperated with Defendants during the investigation of the Claim by responding to inquiries and making the Property available to Defendants and their consultants for inspections. Despite evidence of a covered loss involving additional damage to the Property, Defendants have failed to fully and timely pay the Claim for covered damages. Defendants' inadequate investigation, including the wrongful denial of full policy benefits, has necessitated the filing of this suit.

## **V. CLAIMS AGAINST DEFENDANTS**

### **a. Breach of Policy Contract**

15. Plaintiff reasserts and incorporates by reference all the facts and allegations set forth above for this cause of action. All prerequisites for the filing of this suit and recovery of damages have been met by the Plaintiff.

16. Plaintiff would show that the Policy was in full force and effect upon discovery of the covered physical loss or damage to its Property. The Policy insures against Direct Physical Loss to Covered Property caused by a covered peril. The Policy provides coverage for damage resulting from a hailstorm. Accordingly, the event constitutes a covered peril under the Policy of insurance issued by Defendants.

17. Plaintiff timely submitted a claim to Defendants for payment of the Claim for covered damages to its Property. Defendants have refused and failed to fully pay pursuant to the terms of the Policy, and by failing to do so, have breached the Policy.

### **b. Common Law Causes of Action**

18. Plaintiff reasserts and incorporates by reference all the facts and allegations set forth above for this cause of action. All prerequisites to the filing of this suit and recovery of damages have been met by the Plaintiff.

19. By its acts, omissions, failures and conduct, Defendants breached the common law duty of good faith and fair dealing by delaying and denying fully payment of Plaintiff's claim for damages to its Property without a reasonable basis and by failing to conduct a reasonable investigation with respect to the Claim. Defendants also breached their duty by unreasonably delaying payment of the Claim and failing to fully settle Plaintiff's entire claim when it knew or should have known that it was reasonably clear that such claim was covered. These acts, omissions, failures, and conduct of Defendants are a proximate cause of Plaintiff's damages.

**c. Texas Insurance Code Violations**

20. Plaintiff reasserts and incorporates by reference all the facts and allegations set forth above. Plaintiff has met all conditions precedent to bringing this cause of action against Defendants.

21. By their acts, omissions, failures, and conduct, Defendants have engaged in unfair or deceptive acts or practices in the business of insurance in violation of Sections 541.051 and 541.060 of the Texas Insurance Code. Such violations include, without limitation, the conduct described in this petition plus Defendants' unreasonable delays in the investigation and resolution of the Claim and its failure to pay such claim after liability had become reasonably clear. Specifically, Defendants committed the following unfair insurance practices:

- a. Defendants engaged in unfair claims settlement practices prohibited by Tex. Ins. Code § 541.060(a)(2)(A) and Tex. Bus. & Com. Code § 17.50(A)(4) by failing to attempt, in good faith, to effectuate a prompt, fair and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear;

- b. Defendants engaged in unfair claims settlement practices prohibited by Tex. Ins. Code § 541.060(a)(3) and Tex. Bus. & Com. Code § 17.50(a)(4) by failing to provide promptly to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or for the offer of a compromise settlement of a claim;
- c. Defendants engaged in unfair claims settlement practices prohibited by Tex. Ins. Code Section § 541.060(a)(4) and Tex. Bus. & Com. Code § 17.50(a)(4) by failing within a reasonable time to affirm or deny coverage of a claim or submit a reservation of rights to a policyholder; and
- d. Defendants engaged in unfair claims settlement practices prohibited by Tex. Ins. Code § 541.060(a)(7) and Tex. Bus. & Com. Code § 17.50(a)(4) by refusing to pay a claim without conducting a reasonable investigation with respect to the claim.

22. All of the above-described acts, omissions and failures of Defendants were a proximate and producing cause of Plaintiff's damages. Further, said unlawful acts and practices were committed knowingly and intentionally, for which Plaintiff should recover additional damages as provided by the Texas Insurance Code.

**d. DTPA Violations**

23. Plaintiff reasserts and incorporates by reference all the facts and allegations set forth above. Plaintiff has met all conditions precedent to bringing this cause of action against Defendants.

24. Defendants' conduct, acts, omissions, and failures as described herein constitute the use or employment by any person of an act or practice in violation of Tex. Ins. Code Ch. 541, giving Plaintiff the right to relief pursuant to Tex. Bus. & Com. Code § 17.50(a)(4).

25. All of the above-described acts, omissions, and failures of Defendants were a proximate and producing cause of Plaintiff's damages. Further, said deceptive acts and practices were committed knowingly and intentionally, for which Plaintiff should recover additional damages as provided by the DTPA.

**e. Violation of Prompt Payment of Claims Act**

26. Plaintiff reasserts and incorporates by reference all the facts and allegations set forth above. Plaintiff has met all conditions precedent to bringing this cause of action against Defendants.

27. Defendants violated the Prompt Payment of Claims Act, Tex. Ins. Code § 542.051 by failing to properly and timely investigate and fully pay the Claim. Defendants' failure to pay the Claim within 60 days of receipt of all items, statements and forms reasonably requested constitutes an automatic violation of Section 542.058, which provides: "*Except as otherwise provided, if an insurer, after receiving all items, statements, and forms reasonably requested and required under Section 542.055, delays payment of the claim for a period exceeding the period specified by other applicable statutes or, if other statutes do not specify a period, for more than 60 days, the insurer shall pay damages and other items as provided by Section 542.060.*"

28. Defendants' wrongful rejection of the Claim necessarily means it failed to pay within 60 days automatically violating Section 542.058. Accordingly, Plaintiff is entitled to the relief set forth in Section 542.060 of the act, including attorneys' fees.

**VI. CONDITIONS PRECEDENT**

29. All conditions precedent necessary to maintain this action have been performed by Plaintiff.

**VII. DAMAGES**

30. The above-described acts, omissions, failures and conduct of Defendants caused Plaintiff's damages, which include, without limitation, the full cost to replace or repair its damaged Property. Plaintiff is also entitled to recover penalty interest on all unpaid monies owed on the Claim as damages under the Prompt Payment of Claims Act.

**VIII. ADDITIONAL DAMAGES**

31. Defendants "knowingly" and/or "intentionally" committed deceptive trade practices and unfair insurance practices as those terms are defined in the applicable statutes.

32. As a result of Defendants' knowing and/or intentional misconduct, Plaintiff is entitled to additional damages as authorized by the Texas Insurance Code and DTPA.

**IX. ATTORNEYS' FEES**

33. As a result of the above-described wrongful acts by Defendants, Plaintiff has engaged the services of the below-signed attorneys. Plaintiff seeks attorneys' fees for the prosecution of this suit pursuant to Tex. Bus. & Comm. Code § 17.50(d), Tex. Ins. Code §§ 541 and 542 and Tex. Civ. Prac. & Rem. Code 38.001.

**X. JURY DEMAND**

34. Pursuant to Tex. R. Civ. P. 216, Plaintiff demands a jury trial.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendants be cited to appear, and that upon final jury trial, Plaintiff be awarded damages as set forth above in the sum in excess of the minimum jurisdiction of this Court, costs of Court, attorneys' fees trial and any subsequent appeal of this case, pre and post-judgment interest at the highest rate permitted by law, damages pursuant to the Texas Insurance Code and Texas Business and Commerce Code, and for such other and further relief, both at law or in equity, to which Plaintiff may be justly entitled.



Respectfully submitted,

/s/ Robert N. Grisham II

Robert N. Grisham II

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State Bar No. 00792550

William A. Kendall

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GRISHAM & KENDALL, PLLC

5910 N. Central Expy., Ste. 925

Dallas, Texas 75206

Telephone: (214) 308-2027

Facsimile: (214) 308-2036

**ATTORNEYS FOR PLAINTIFF**

**Automated Certificate of eService**

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Stella Betancourt on behalf of Robert Grisham, II  
 Bar No. 00792550  
 stella@grishamlaw.com  
 Envelope ID: 78517581  
 Filing Code Description: Petition  
 Filing Description: PLAINTIFFS ORIGINAL PETITION  
 Status as of 8/15/2023 12:22 PM CST

Associated Case Party: ESTHER'S FOLLIES, INC.

Name	BarNumber	Email	TimestampSubmitted	Status
Stella A. Betancourt		stella@grishamkendall.com	8/14/2023 4:50:09 PM	SENT
William A. Kendall		wkendall@grishamkendall.com	8/14/2023 4:50:09 PM	SENT
Robert N. Grisham II		robert@grishamkendall.com	8/14/2023 4:50:09 PM	SENT

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CITATION  
THE STATE OF TEXAS  
CAUSE NO. D-1-GN-23-004387

ESTHER'S FOLLIES, INC.

, PLAINTIFF(S)

vs.

UNITED STATES LIABILITY INSURANCE COMPANY; MOUNT VERNON FIRE INSURANCE  
COMPANY

, DEFENDANT(S)

TO: UNITED STATES LIABILITY INSURANCE COMPANY  
BY SERVING ITS REGISTERED AGENT DANIEL BUECHLER  
THOMPSON COE COUSINS & IRONS LLP  
700 N PEARL STREET#2500  
DALLAS TX 75201-2832

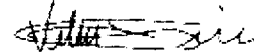
Defendant, in the above styled and numbered cause:

**YOU HAVE BEEN SUED.** You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 A.M. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you. In addition to filing a written answer with the clerk, you may be required to make initial disclosures to the other parties of this suit. These disclosures generally must be made no later than 30 days after you file your answer with the clerk. Find out more at [TexasLawHelp.org](http://TexasLawHelp.org).

Attached is a copy of the **PLAINTIFFS ORIGINAL PETITION** in the above styled and numbered cause, which was filed on **August 14, 2023** in the **200th District Court** of Travis County, Austin, Texas.

ISSUED AND GIVEN UNDER MY HAND AND SEAL of said Court at office, **August 15, 2023**

REQUESTED BY:  
GRISHAM, ROBERT NATHAN, II  
5910 N. CENTRAL EXPY #925  
DALLAS, TX 75206



Seal of the  
Travis County District Clerk  
1000 Guadalupe Street, P.O. Box 120000 Austin, TX 78712

Ruben Tamez, Deputy

RETURN

Came to hand on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ at \_\_\_\_\_ o'clock \_\_\_\_\_ M., and executed at \_\_\_\_\_ within the County of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ M., by delivering to the within named \_\_\_\_\_, each in person, a true copy of this citation together with the **PLAINTIFFS ORIGINAL PETITION** accompanying pleading, having first attached such copy of such citation to such copy of pleading and endorsed on such copy of citation the date of delivery.

Service Fee: \$ \_\_\_\_\_

Sheriff / Constable / Authorized Person

Sworn to and subscribed before me this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

By: \_\_\_\_\_

Printed Name of Server

\_\_\_\_\_ County, Texas

Notary Public, THE STATE OF TEXAS  
D-1-GN-23-004387

SERVICE FEE NOT PAID